71-1429

No.

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MICHAEL RODAK, JR

In the Supreme Court of the United States

OCTOBER TERM, 1971

PARTICULAR CLEANERS, INC. and FRANCES ENTWISTLE,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE H. GERSTMAN
NORMAN LETTVIN
135 South La Salle Street
Chicago, Illinois 60603

WARREN P. LANDSMAN
ROBERT L. LANDSMAN
77 West Washington Street
Chicago, Illinois 60602

Counsel for Petitioners

May, 1972

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the Supreme Court of the United States

OCTOBER TERM, 1971

NO.

PARTICULAR CLEANERS, INC. and FRANCES ENTWISTLE,
Petitioners,

vs.

COMMONWEALTH EDISON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Particular Cleaners, Inc. and Frances Entwistle, respectfully pray that a writ of certiorari issue to review the judgment entered on February 11, 1972 by the United States Court of Appeals for the Seventh Circuit in its cause numbered 71-1349.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported, but is printed in the Appendix to this Petition at p. A9. The opinion of the District Court for the Northern District of Illinois is not reported, but is printed in the Appendix to this Petition at p. A14.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1972 (App. p. A13),* and this Petition for a Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

As to the Certiorari Policy: Should not the Supreme Court resolve the existing conflict in principle between the Fourth and Fifth Circuit Courts of Appeals on the one hand, and the Seventh Circuit Court of Appeals on the other hand, as to what action of a public electric utility constitutes "state action"?

On the Merits: Illinois Commerce Commission General Order 172 (App. p. A2) permits public utilities (electric, gas, telephone, water and heating services) to collect an advance security deposit from prospective customers. Is arbitrary discrimination in the collection of security deposits, by a public utility under color of Illinois Commerce Commission General Order 172, "state action" so as to subject the public utility to provisions of the Civil Rights Act?

CONSTITUTIONAL PROVISION, STATUTES AND ORDINANCE INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution (App. p. A1); Section 1983 of the Civil Rights Act (App. p. A1); Section 1343(3) of Title 28, United States Code (App. p. A1); and Illinois Commerce Commission General Order 172 (App. p. A2).

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* "App. p. A....." refers to the cited page of the Appendix to this Petition.

STATEMENT OF THE CASE

The class-action Complaint (App. p. A17) was filed in the District Court on November 12, 1970 and alleges the following facts:

Under color of an Illinois Commerce Commission regulation, thousands of purchasers of electric service from Defendant Commonwealth Edison Company are not required to pay a security deposit in order to receive electric service, while on the other hand, thousands of purchasers of electric service from Commonwealth Edison are arbitrarily and discriminatorily required to pay a security deposit based upon unequal standards and policies arbitrarily dictated by Commonwealth Edison (App. p. A19). Plaintiffs Particular Cleaners and Frances Entwistle are two purchasers that Commonwealth Edison arbitrarily and under color of an Illinois Commerce Commission regulation, required to pay a security deposit in order to maintain electric service (App. pp. A19-A20).

Commonwealth Edison has a total monopoly on electric service in the City of Chicago where Plaintiff Entwistle resides and in the Village of Oak Park, Illinois where Plaintiff Particular Cleaners has its principal place of business (App. p. A20). Plaintiff Entwistle is a female of British citizenship and Plaintiff Particular Cleaners is a dry cleaning establishment. Unless Commonwealth Edison provides and sells electric service to Particular Cleaners and Frances Entwistle, they will be deprived of obtaining and/or maintaining electric service (App. p. A20).

Count I of the Complaint charges that Commonwealth Edison's arbitrary discrimination in requiring advance security deposits under color of an Illinois Commerce Commission regulation is contrary to the Fourteenth Amendment to the Constitution of the United States (App. p. A20). Jurisdiction of Count I of the Complaint was founded on 28 U.S.C. §1343.

In the District Court, Commonwealth Edison moved to dismiss the Complaint on several grounds, one of which was that Commonwealth Edison's action in requiring security deposits was not under color of any state ordinance or regulation (was not "state action"), and therefore Commonwealth Edison alleged that it was not subject to the Civil Rights Act (in particular, 42 U.S.C. §1983). The District Court granted Commonwealth Edison's motion to dismiss, holding that Commonwealth Edison's action in requiring security deposits is not "state action" sufficient to satisfy 42 U.S.C. §1983 and permit maintenance of the lawsuit (App. p. A16). The Court of Appeals for the Seventh Circuit affirmed the District Court's dismissal of Petitioners' Complaint (App. p. A13).

REASONS FOR GRANTING THE WRIT

I. The Present Case Raises A Serious Constitutional Question.

Electricity is an absolute *necessity* of today's life. Without electricity, Petitioner Particular Cleaners would be unable to operate its dry cleaning establishment and Petitioner Frances Entwistle would be unable, among other things, to heat and light her home. Notwithstanding the necessity of having electrical service, Commonwealth Edison requires advance security deposits from some and not others, using arbitrary and unreasonable discriminatory standards. Typically those who are required to pay the advance security deposit are those who have most difficulty in paying it. The amount is variable, and as an example, Particular Cleaners was required to pay $900.00 as an advance security deposit.

Petitioners contend that every person has the *equal* right to have electrical service, so long as the person pays for it. But Commonwealth Edison arbitrarily denies that right to some persons by requiring advance security deposits from some, and not others. The security deposit requirements are not necessarily based on a person's history with paying Commonwealth Edison's bills, but upon arbitrary standards such as sex, residence location and race. Such unreasonable discrimination, under color of a state ordinance, is clearly violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II. Respondent's Action Is State Action.

The Respondent, Commonwealth Edison Company, has been granted a *total monopoly* in certain areas by the State of Illinois. In effect, the State of Illinois decided not to supply public electric service itself, but instead permitted Commonwealth Edison to act as its agent. The regulatory agency of Illinois, the Illinois Commerce Commission, is empowered to regulate the policies of Commonwealth Edison.

Although Commonwealth Edison is privately owned, its security deposit requirements are pursuant to a state ordinance, ICC General Order 172 (App. p. A2). The intense contact of Commonwealth Edison and the State of Illinois is evident from the facts that:

(1) Commonwealth Edison is subject to close regulation by the Illinois Commerce Commission.

(2) The regulations of Commonwealth Edison filed with the Illinois Commerce Commission are required to be filed as a condition of Commonwealth Edison's operation.

(3) Commonwealth Edison's regulations must be approved by the Illinois Commerce Commission to be effective.

(4) Commonwealth Edison is given a total monopoly by the Illinois Commerce Commission.

(5) The Illinois Commerce Commission controls the rates charged and the services offered by Commonwealth Edison.

(6) The actions of Commonwealth Edison are subject to review by the Illinois Commerce Commission.

In the Court of Appeals, Commonwealth Edison took the position that it is a privately owned business carrying on its own "normal business policies with regard to requiring deposits and not state action." However, it is improper to consider Commonwealth Edison as a typical privately owned business because of Commonwealth Edison's intense contact with the State of Illinois. Where the typical privately owned company is in open competition with other similar companies, Commonwealth Edison has a total monopoly imposed by state mandate, with its profit being controlled by the state. A prospective purchaser of electrical service cannot go elsewhere — he must purchase the electrical service from Commonwealth Edison.

And the charging of advance security deposits in an arbitrary manner to selected persons is not a normal, internal business practice, such as giving employees certain days off, etc. By arbitrarily selecting who should pay a security deposit, and by arbitrarily selecting the amount of the security deposit, Commonwealth Edison can effectively prevent selected persons, *through no fault of such persons,* from having electrical service.* Thus the power to grant or not to grant electrical service, which is given Commonwealth Edison by the State of Illinois, is clearly a governmental function. This Court has stated that "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under

* Clearly Particular Cleaners would be unable to commence business without electrical service. Although it is undisputed that Edison had no prior history of any collection problems with Particular Cleaners and there were no debt judgments against Particular Cleaners, Edison arbitrarily required Particular Cleaners to pay a $900.00 security deposit in order to maintain its electrical service. Such a requirement coupled with Particular Cleaners' starting expenses in business may have put it out of business.

color of' state law." *United States* v. *Classic,* 313 U.S. 299, 326; 85 L.Ed. 1368, 1383 (1941). This Court should resolve the important question of whether Commonwealth Edison's action, in arbitrarily charging security deposits to some and not others, is "state action" subjecting Commonwealth Edison to provisions of the Civil Rights Act.

III. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Proper Interpretation Of "State Action" By A Public Electric Utility.

It is abundantly clear that had the present case been in the Fourth or Fifth Circuits, a contrary decision would have been reached. In those Circuits, it is seen that the action of a public utility under a state regulatory agency's regulation, is "state action."

In *Parker* v. *Brown,* 317 U.S. 341 (1943), the Supreme Court held that a marketing program instituted pursuant to the California Agricultural Prorate Act was exempt from the Sherman Act on the ground that the anti-competitive actions involved there were the result of "state action." Thus the doctrine of *Parker* v. *Brown* is that the antitrust laws are directed against individual action, not "state action." In other words, if a defendant can show that his action is under color of state law (i.e., "state action"), under *Parker* v. *Brown* he is immune from Federal antitrust laws.

The Court of Appeals for the Fourth Circuit and the Court of Appeals for the Fifth Circuit have considered whether certain practices of public utilities involve "state action" thereby making such public utilities immune from antitrust attack under the *Parker* v. *Brown* doctrine. These cases are *Washington Gas Light Company* v. *Virginia Electric and Power Company,* 438 F.2d 248 (4 Cir., 1971)

and *Gas Light Company of Columbus* v. *Georgia Power Company*, 440 F.2d 1135 (5 Cir., 1971). In both of these cases, the respective Courts of Appeal held that the complained-of practices by the defendants were "state action" and therefore exempt from the purview of Federal antitrust legislation under *Parker* v. *Brown*.

In *Washington Gas Light Company* v. *Virginia Electric and Power Company*, the Court of Appeals stated (438 F.2d at 251-252):

> "The Virginia State Corporation Commission is without question a proper state agency to qualify under *Parker*. Section 155 of the Virginia State Constitution makes explicit provision for the SCC giving it the power, among other things, to prescribe utility rates and, subject to the authority of the state legislature, to regulate other non-specified corporate utility activities. Sections of the Virginia Code provide a detailed system of regulatory powers and procedures whereby administrative action may be taken and reviewed with respect to 'rates, tolls, charges, schedules' etc.
>
> "There can be no doubt, and in fact Washington Gas Light does not argue to the contrary, that the SCC is a regulatory arm of the state, possessing both the authority and powers necessary to qualify under *Parker*. * * * We think VEPCO's promotional practices were at all times within the ambit of regulation and under the control of SCC, and we hold these practices exempt from the application of the laws of antitrust under the *Parker* doctrine."

In *Gas Light Company of Columbus* v. *Georgia Power Company*, the Court of Appeals stated:

> "The question presented is whether the court below erred in holding that these rate schedules were the products of state action, i.e., products of the Georgia Public Service Commission, and as such, excluded from

the proscription of the federal antitrust laws under the teaching of *Parker* v. *Brown, supra.* (440 F.2d at 1138).

• • •

"Our view is that the *Parker* exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of considered judgment of the state regulatory authority; here the Georgia Public Service Commission." (440 F.2d at 1140).

It can be seen that in the Fourth and Fifth Circuits, practices of public utilities under the auspices of state regulatory commissions are considered "state action" thereby immunizing such public utilities from antitrust liability. In sharp contrast, in the present case the Seventh Circuit holds that an action by public utility Commonwealth Edison, which action is clearly under color of a specific state ordinance and under the auspices of the Illinois Commerce Commission, is not "state action."

This Court should not permit an electric utility in the Seventh Circuit to successfully claim "individual action" and become immune from the civil rights laws, while at the same time electric utilities in the Fourth and Fifth Circuits successfully claim "state action" and become immune from the antitrust laws. This important conflict in construction of "state action" between the Fourth and Fifth Circuits on the one hand, and the Seventh Circuit on the other hand, should be resolved by this Court.

CONCLUSION

Commonwealth Edison is granted monopoly status by the State of Illinois and security deposits are arbitrarily required from certain classifications of persons and companies under color of Illinois Commerce Commission General Order 172. In such collection of security deposits, Commonwealth Edison has the effective power to grant or not to grant electrical service, is cloaked with the authority of the State, and its practices constitute "state action."

The decision by the Court of Appeals for the Seventh Circuit, holding that Respondent's action is not "state action", is contrary to the decisions that would have been reached by the Courts of Appeals for the Fourth and Fifth Circuits. For the reasons stated, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GEORGE H. GERSTMAN
NORMAN LETTVIN
WARREN P. LANDSMAN
ROBERT L. LANDSMAN
Attorneys for Petitioners

LETTVIN AND GERSTMAN
135 South LaSalle Street
Chicago, Illinois 60603
Telephone: 641-3320

May, 1972

APPENDIX

Constitution

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

42 U.S.C. § 1983 (Civil Rights Act):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION
GENERAL ORDER 172—Revised

1. SCOPE AND APPLICATION

These rules shall apply to the establishment and maintenance of credit by customers using cooling, electric, gas, heating, telephone, sewer or water service rendered by any public utility which is defined as such by Section 10 of "An Act concerning public utilities," as amended, the handling of customers' deposits, discontinuance of such service for nonpayment of bills or failure to establish or maintain credit, and matters relating thereto.

2. THE SAVING CLAUSE

The adoption of these rules shall in no way preclude the Commission from altering or amending them, in whole or in part, or from requiring or authorizing rules containing other provisions whenever it shall be deemed to the public interest so to do. The requirements specified herein shall not relieve any Utility of any statutory requirement, shall not supersede any rules heretofore filed by any Utility with the Commission and presently in effect, and shall not preclude the application of other rules which may be filed with the Commission by any Utility and permitted by the Commission to become effective.

3. DEFINITION OF DELINQUENCY

A customer who has not paid his bill for service within the prompt payment period will be considered delinquent. Where the Utility allows no discount for prompt payment, the customer will be considered delinquent if he has not paid his bill within the time specified for payment in the Utility's rates or rules as filed with the Commission. If the Utility

has no rates or rules on file setting forth the time after which the customer will be considered delinquent, the customer will be considered delinquent if he has not paid his bill within ten (10) days after the bill is mailed or delivered by other means.

4. ESTABLISHMENT OF CREDIT

(a) Present Customers. If any present customer has been delinquent in the payment of any two consecutive bills, or has been delinquent three or more times within the preceding twelve months, or if the Utility has reasonable grounds to believe that the customer is a questionable credit risk, such customer may be required to make a cash deposit in order to establish his credit. Payment by the customer of delinquent bills will not of itself relieve the customer from the obligation of establishing his credit with respect to the account involved or with respect to any other account in connection with the same or any other class of service which the Utility may be providing such customer.

(b) Applicants for Service. Before service is rendered, every applicant for initial or additional service in addition to complying with all other applicable rules and regulations, may be required to establish credit. The applicant shall be notified promptly of such requirement to prevent any undue delay in the furnishing of service. Service may be denied as long as the applicant owes the Utility for service of the same class (residential or business) previously furnished to him at the same or another location. Any applicant who has not established his credit, as provided under Rule 5, may be required before service is established to (1) pay the service connection charge, if any; and (2) make an advance payment on his service account in an amount equal to an estimated periodic bill. An advance payment shall not relieve the applicant of his responsibility subsequently to fully establish his credit.

5. MEANS BY WHICH CUSTOMER OR APPLICANT MAY ESTABLISH CREDIT

Any customer or applicant may establish his credit by compliance with either of the following conditions:

(a) If he shall furnish information as to his credit and the Utility, after prudent investigation, shall reasonably believe that he is entitled to credit.

(b) If he makes a cash deposit in accordance with the requirements in Rule 6.

6. AMOUNT OF CASH DEPOSIT

(a) The amount of the cash deposit which may be required of a customer or applicant for the purpose of establishing his credit, as provided under Rule 5, shall not exceed his estimated bill figured at the gross rate for the class of service involved for a periodic billing period plus forty-five (45) days. The determination of a customer's (as distinguished from an applicant's) estimated bill shall be based upon his prior or current use of the class of service involved.

(b) The amount of the cash deposit may be adjusted on the basis set forth in Rule 6, Paragraph (a), at the option of the customer or the Utility at any time when the character or degree of the customer's use of the service has materially changed, or when it develops that the character or degree of such use will materially change.

7. CONDITIONS UNDER WHICH DEPOSITS ARE TO BE APPLIED OR REFUNDED

The Utility shall promptly refund the deposit (with interest as set forth under Rule 8) and may require the surrender to the Utility of the receipt or certificate of deposit properly endorsed, or delivery of a cancellation receipt for the deposit:

(a) When the customer establishes credit by other means, or

(b) When the service is discontinued and the bills therefor are paid in full, or

(c) When the service is discontinued and there are charges due the Utility for service to the customer, the cash deposit plus interest will be applied to the charges, and the balance remaining of the deposit and interest, if any, returned to the customer. When the deposit is applied to the liquidation of unpaid bills, the Utility shall mail, or deliver, to the customer a statement showing the amount of the original deposit including accrued interest, if any; the amount of the unpaid bills liquidated by the deposit; and the balance remaining due to either the customer or the utility.

In either case and in any event, if there is a balance due the customer when the service is discontinued it shall then be immediately due and payable to the customer without demand or notice from him.

8. INTEREST TO BE PAID ON DEPOSITS

Interest at the rate of not less than seven percent (7%) compounded annually shall be paid by the utility on all deposits held (including accrued simple interest) and acquired by the utility on or after January 1, 1970 for the purpose of the customer establishing credit, effective January 1, 1970 but in no case shall interest be allowed for a period extending beyond the date of refund or the date service is terminated, whichever date is earlier.

9. PAYMENT OF INTEREST ACCRUALS

Interest accruing on cash deposits shall be computed and prompt settlement made:

(a) By paying the amount of interest accrued on the demand of the customer but not oftener than once in any twelve months' period, or

(b) By adding the amount to the deposit upon the return or application of the customer's deposit as set forth in Rule 7.

10. ISSUANCE OF RECEIPT OR CERTIFICATE OF DEPOSIT

Concurrently with the receipt of a cash deposit by a Utility from a customer under the provisions of these rules, the Utility shall issue and deliver, to said customer, a receipt or certificate of deposit showing thereon (1) the date thereof, (2) the name of the customer, (3) the address of the premises served or to be served, (4) the service to be furnished, (5) the amount of the deposit, (6) the rate of interest to be paid thereon from said date, and (7) stating that (a) the amount of the deposit, plus said interest, will be refunded to the customer when credit has been established to the satisfaction of the Utility, or may be applied by the Utility at any time to the liquidation of unpaid bills of the customer; (b) the balance, if any, remaining after liquidation of unpaid bills to the date that service to the customer is discontinued will be so refunded; (c) said interest will cease and terminate upon said date of discontinuance; (d) any amount remaining on deposit when service is discontinued shall be immediately payable to the customer without demand by or notice from him; and (e) the Utility will dispose of the balance of any deposit remaining after the period set forth in the Illinois Uniform Disposition of Unclaimed Property Act, which period commences with the date of termination of service, in accordance with the provisions of said Act.

11. DISCONTINUANCE OF SERVICE

Service may be discontinued by the Utility for failure of a customer to establish credit, or to adjust his cash deposit, or for nonpayment of a delinquent bill owed to the Utility for the same class (residential or business) of service furnished to him at the same or another location, but only after the mailing or delivery by other means of a written notice by the Utility of its intention to discontinue service. Service may be discontinued by the Utility at the end of the period established under the Utility's rules as filed with the Commission, but where the Utility has no such rules on file, service shall not be discontinued until at least five (5) days after the mailing or delivery of such written notice of intention to discontinue service.

12. SERVICE RECONNECTION CHARGE

Where service has been discontinued pursuant to the terms of the notice provided for in Rule 11 herein, the Utility shall charge and collect the reconnection charge, if any, set out in any rules, regulations or terms and conditions of service which may be filed by the Utility with the Commission and permitted by the Commission to become effective.

13. RECORDS OF DEPOSITS

Each Utility collecting cash deposits from its customers shall maintain a complete record of each and every deposit showing (a) the name of the customer; (b) address of the premises served; (c) date and amount of original deposit and any additional deposits; (d) date and amount of any refund or application to unpaid bills; (e) the amount of interest paid or credited with the date of payment or

credit; and (f) the balance of each deposit, the Commission will require to be shown in each Utility's annual report the total amount remaining in its customer deposit account.

14. FINAL DISPOSITION OF A DEPOSIT

* The Utility shall have the right to close its records with reference to any unrefunded deposit and to destroy the records and other data relating to such deposit when such deposit has been disposed of in accordance with the provisions of the Illinois Uniform Disposition of Unclaimed Property Act.

*Note: This provision supplements the requirements of Paragraph 37 of General Order 186; Paragraph 37 of General Order 187; and Paragraph 37 of General Order 189.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1349

PARTICULAR CLEANERS, INC. and FRANCES ENTWISTLE,
Plaintiffs-Appellants,

vs.

COMMONWEALTH EDISON COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois. — No. 70-C-2831
WILLIAM J. LYNCH, *Judge.*

February 11, 1972

Before HASTINGS, *Senior Circuit Judge,* KILEY, *Circuit Judge,* and KERNER*, *Circuit Judge.*

* Judge Kerner heard oral argument, but did not participate in the adoption of this opinion.

HASTINGS, *Senior Circuit Judge.* Plaintiffs Particular Cleaners, Inc., an Illinois corporation, and Frances Entwistle, a citizen of the United Kingdom residing in Oak Park, Illinois, filed a so-called "civil rights" action against defendant Commonwealth Edison Company (Edison), a private Illinois corporation engaged in the commercial distribution of electricity. The gravamen of the complaint relates to Edison's practice of requiring a security deposit from certain customers, who cannot otherwise show credit, prior to the commencement of electrical service.

In substance, Count I of the complaint alleges that the method used by Edison for determining which prospective customers will be required to pay the deposit is arbitrary, capricious and discriminatory, and is violative of plaintiffs' rights secured by the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. Plaintiffs seek to prosecute this cause as a class action and apparently predicate their action under Title 42, U.S. C.A. § 1983[1] and by reason thereof assert jurisdiction under Title 28 U.S.C.A. § 1343(3).[2]

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[1] "§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] "§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any

Count II of the complaint is based on the claim that Edison's security deposit policies violate Section 38, Ill. Rev. Stat., ch. 111⅔ (1969), which prohibits rate discrimination. The only jurisdiction of the federal district court on this count was based on the theory of pendent jurisdiction.

The trial court dismissed both counts of the complaint on Edison's motion. Count I was dismissed on the ground that Edison's challenged security deposit requirement did not constitute state action sufficient to satisfy the jurisdictional requirements of § 1983, *supra*. Since Count I was dismissed, the trial court necessarily dismissed Count II, there being no remaining pendent jurisdiction.

The primary question on this appeal is whether the alleged discriminatory collection of security deposits by Edison, authorized by General Order 172 — Revised issued by the Illinois Commerce Commission, constitutes conduct under color of state action that will subject it to a civil rights action under § 1983, *supra*. Further, is the disposition of this case controlled by *Kadlec* v. *Illinois Bell Telephone Company*, 7 Cir., 407 F.2d 624 (1969), cert. denied, 396 U.S. 846, as the district court held?

General Order 172 — Revised provides, *inter alia*, for the collection of limited security deposits from applicants

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(footnote continued)

civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinances, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

• • •"

or customers seeking to use "cooling, electric, gas, heating, telephone, sewer or water service rendered by any public utility." The complaint does not challenge the propriety of the action of the Illinois Commerce Commission or the order itself. It complains of "the standards and policies arbitrarily dictated by numerous representatives of" Edison. The order in no way directs or orders the collection of any security deposits. It merely serves to limit the power of public utilities to require deposits. There is no allegation that a public utility could not require such a deposit without this regulation. The decision to require security deposits to insure credit and its application of this policy in any particular case is strictly a private management decision to be made by Edison in its own normal business operation. Edison is neither the State of Illinois nor an agency thereof. We fail to see how the execution of these policies by Edison in the context of the case before us could constitute state action.

In *Kadlec* v. *Illinois Bell Telephone Company, supra,* we held that a telephone company's discontinuance of plaintiffs' "Call-Pak" service pursuant to its own regulations filed with state authorities did not amount to conduct taken under color of state law and would not support an action based on § 1983. Plaintiffs seek to distinguish *Kadlec* from their case by claiming that in *Kadlec* it was the public utility's *own regulation* that was involved while here the regulation was issued by the Illinois Commerce Commission. We find this unpersuasive. As above pointed out, the state did not act on its own regulation. Edison executed its own policies, limited only by the state regulation.

In the case at bar, the statute in no sense benefited from, encouraged, requested or cooperated in the decision to collect security deposits from plaintiffs. *See Kadlec,* at 626.

Kadlec was followed in *Martin* v. *Pacific Northwest Bell Telephone Company*, 9 Cir., 441 F.2d 1116 (1971), cert. denied, 404 U.S. 873 (October 12, 1971), where the court said at 1118: "The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983. * * * [citing Kadlec] * * *. In this case, plaintiff's allegations at most concern Pacific Bell's public service functions; they neither show nor tend to show an intrusion by the State into matters of Pacific Bell's internal management." *See Powe* v. *Miles*, 2 Cir., 407 F.2d 73, 81 (1968); and *Lucas* v. *Wisconsin Electric Power Company*, D.C.E.D. Wis., 322 F.Supp. 337, 340 (1970).

We have considered cases cited by plaintiffs seeking to distinguish *Kadlec* and find them inapposite to our present consideration. Further, the parties have argued other issues on appeal which were argued to the district court but not reached by it in its decision. We do not find it necessary to reach them here.

As was simply stated in *Kadlec*, at 626-27: "Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983." And we perceive no substantial difference between the state action asserted in *Kadlec* and that asserted here.

We affirm the district court's dismissal of appellants' complaint.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PARTICULAR CLEANERS, INC., an Illinois corporation, and FRANCES ENTWISTLE

Plaintiffs

vs.

COMMONWEALTH EDISON COMPANY, an Illinois corporation

Defendant

MEMORANDUM OF DECISION
(Filed March 16, 1971)

Defendant, Commonwealth Edison, filed a motion to dismiss this cause of action for want of jurisdiction. The complaint asserts a cause of action predicated on 42 U.S.C. § 1983. Jurisdiction, if it exists, obtains pursuant to 28 U.S.C. § 1343. The gravamen of the complaint concerns the defendant's practice of requiring a security of deposit from certain customers prior to the commencement of electrical service. The plaintiff alleges that the method used for determining which prospective customers will be required to pay this deposit is arbitrary, capricious and discriminatory, and accordingly inimical to rights secured by the Equal Protection Clause of the fourteenth amendment.

The crucial strain of all complaints sounding under this provision of this reconstructionist civil rights statutes is action taken under color of state law, or more prosaically

state action. Further, such state action is a necessary requisite for obtaining this court's jurisdiction. Here the complaint is not asserted against an acknowledged state officer or agency. Rather the defendant is a private corporation. However, the plaintiffs assert that this private corporation is so circumscribed and protected by the state that its action is in fact state action sufficient to satisfy the jurisdictional requirements of 42 U.S.C. § 1983 and permit the maintenance of this suit.

At the outset it must be recognized that the mere regulation of a business by a state is in itself insufficient to satisfy the jurisdictional requisite of § 1983. Something more than mere regulation is required.

In *Kadlec* v. *Illinois Bell Telephone Co.*, 407 F.2d 624 (1969) a similar complaint was brought under § 1983. The Court of Appeals of this circuit held that a motion to dismiss was properly granted. The court noted that the termination of a particular type of service that was the basis for the complaint was precipitated by private economic reasons and was pursuant to the company's own regulations.

The court continued:

> The only apparent state connection with the termination rests in the fact that defendant Company filed its regulations with state authorities. The state in no sense benefited from, encouraged, requested or cooperated in this suspension of service.
>
> The mere filing of these regulations with the state neither clothed Illinois Bell with state authority nor did it bring it under the aegis of the state. The § 1983 requirement of conduct taken under color of law ". . . can rarely be satisfied in the case of anyone other than

a state official." (cites omitted) Here the nexus between the state and defendant's conduct is not sufficient to maintain an action under § 1983. 407 F.2d 624, 626.

This court's review of the complaint convinces us that the requisite nexus does not exist in this matter. We perceive no substantial difference between the state action asserted in *Kadlec* (supra) and that asserted here. Accordingly this court grants the defendant's motion to dismiss Count I of the Complaint. Further, since jurisdiction over Count II of the Complaint is predicated on a theory of pendant jurisdiction that Count is also dismissed.

WILLIAM J. LYNCH
Judge, United States District Court

Dated: March 15, 1971

IN THE UNITED STATES DISTRICT COURT

FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PARTICULAR CLEANERS, INC., an Illinois Corporation, and FRANCES ENTWISTLE,

Plaintiffs,

VS.

COMMONWEALTH EDISON COMPANY, an Illinois Corporation,

Defendant.

Civil Action — No. 70C-2831
Class Action Complaint Jury Trial Demanded

COMPLAINT

(Filed November 12, 1970)

COUNT I

JURISDICTION

1. This Count I is a civil rights action arising under the Fourteenth Amendment to the Constitution of the United States. Jurisdiction is founded on the existence of a Federal question and U.S.C., Title 28, Section 1343.

PARTIES AND VENUE

2. Plaintiff, PARTICULAR CLEANERS, INC., is a corporation incorporated under the laws of the State of Illinois having its principal place of business in this judicial district. The Plaintiff, FRANCES ENTWISTLE, is an individual residing in the State of Illinois. Defendant, COMMONWEALTH EDISON COMPANY, is a corporation incorporated under the laws of the State of Illinois, having its principal place of business in this judicial district. Plaintiffs have purchased or offered to purchase electric service sold by the Defendant named herein within the period covered by this Complaint.

CLASS ACTION

3. Plaintiffs bring this action on behalf of themselves and pursuant to Rule 23 of the Federal Rules of Civil Procedure in behalf and as representatives of the class of all such purchasers or prospective purchasers in the State of Illinois that have been required to pay a security deposit to Defendant as a prerequisite to obtaining or maintaining electric service. The class is so numerous that joinder of all members is impracticable. Except as to the amount of damages each member of the class has sustained, all other questions of law and fact are common to the class. The questions common to the class predominate over any questions affecting only individual members. This class action is superior to other methods for the fair and efficient adjudication of the controversy described herein. The named Plaintiffs will fairly and adequately protect the interests of the class. Defendant, COMMONWEALTH EDISON COMPANY has acted on grounds generally applicable to the class thereby making appropriate final injunctive relief with respect to the class as a whole.

VIOLATIONS COMPLAINED OF

4. Thousands of prospective purchasers of electric service from Defendant, COMMONWEALTH EDISON COMPANY, are not required to pay a security deposit in order to receive electric service. On the other hand, thousands of prospective purchasers of electric service from Defenant, COMMONWEALTH EDISON COMPANY are arbitrarily and discriminatorily required to pay a security deposit based upon unequal and discriminatory standards and policies arbitrarily dictated by numerous representatives of Defendant, COMMONWEALTH EDISON COMPANY.

5. Plaintiff, PARTICULAR CLEANERS, INC., has been and is currently a purchaser of electric service from Defendant, COMMONWEALTH EDISON COMPANY, within the State of Illinois since as early as October 1, 1970. Plaintiff is not indebted to Defendant, COMMONWEALTH EDISON COMPANY, with respect to any bills or charges for electric service purchased from Defendant, COMMONWEALTH EDISON COMPANY.

6. Notwithstanding the fact that PARTICULAR CLEANERS, INC. is not indebted to the Defendant, COMMONWEALTH EDISON COMPANY, said Defendant has, under color of an Illinois Commerce Commission Regulation, arbitrarily, capriciously and discriminatorily classified Plaintiff, PARTICULAR CLEANERS, INC., as a deposit purchaser of electric service whereby a deposit of approximately three times one month's basic service is required in order to maintain electric service at the corporation's place of business in Oak Park, Illinois. Such acts of Defendant place Plaintiff, PARTICULAR CLEANERS, INC., at an economic disadvantage using an instrumentality of the State, and seriously interfere with Plaintiff's ability to commence and carry on its business, thereby resulting in denial to the corporation of equal protection of the laws,

contrary to the Fourteenth Amendment to the Constitution of the United States, and such discrimination is a violation of Section 38, Ill. Rev. Stat. 1969, ch. 111⅔.

7. Plaintiff, FRANCES ENTWISTLE, is a citizen of the United Kingdom and is not indebted to the Defendant. Notwithstanding the fact that the Plaintiff, FRANCES ENTWISTLE, is not indebted to the Defendant, COMMONWEALTH EDISON COMPANY, said Defendant has, under color of an Illinois Commerce Commission Regulation arbitrarily, capriciously and discriminatorily required said Plaintiff to pay a security deposit as a prerequisite to purchasing electric service at her residence in Chicago, Illinois. Such acts of Defendant place Plaintiff, FRANCES ENTWISTLE, at economic disadvantage using an instrumentality of the State, thereby resulting in denial to her of equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States and such discrimination is a violation of [Sec. 38, Ill. Rev. Stat. 1969, ch. 111⅔].*

8. Defendant has a total monopoly on electric service in the City of Chicago, Illinois, where Plaintiff, FRANCES ENTWISTLE, resides and PARTICULAR CLEANERS, INC. in the Village of Oak Park, Illinois, where the Plaintiff, PARTICULAR CLEANERS, Inc., has its principal place of business.

9. Unless Defendant, COMMONWEALTH EDISON COMPANY, provides and sells electric service to Plaintiffs, PARTICULAR CLEANERS, INC. and FRANCES ENTWISTLE, said Plaintiffs will be deprived from obtaining and/or maintaining electric service.

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* The bracketed portion was added by an Amendment filed November 13, 1970.

10. Thousands of other purchasers or prospective purchasers, not indebted to Defendant have, under color of an Illinois Commerce Commission Regulation, arbitrarily, capriciously and discriminatorily been and will be required to pay a security deposit to Defendant as a prerequisite to purchasing electric service. Such acts place such other persons at an economic disadvantage using an instrumentality of the State, thereby resulting in the denial to persons within the State of Illinois equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, and such acts violate Section 38, Ill. Rev. Stat. 1969, ch 111⅔.

11. The specific amounts of damage have not yet been determined since such determination will require discovery and analysis of Defendant's books and records. When these amounts have been determined, Plaintiffs will seek leave of Court to amend this Complaint to include such amounts.

12. Plaintiffs herein have been compelled to employ attorneys to prosecute this suit and the attorneys for the Plaintiffs are entitled to reasonable attorneys' fees out of a fund which this court is asked to establish by the collection of the fund of deposits in the above-entitled cause. The attorneys for Plaintiffs should be awarded reasonable attorneys' fees and costs and expenses incurred in this proceeding.

PRAYER FOR RELIEF

WHEREFORE, as to this Count I, Plaintiffs pray

A. That the Court adjudge and decree that Defendant has violated the civil rights of Plaintiffs and the acts done in furtherance thereof, were and are in violation of the Fourteenth Amendment to the Constitution of the United States and of Section 38, Ill.Rev.Stat. 1969, ch 111⅔.

B. That the Court determine that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure and that reasonable notice of this action be given each member of the class represented by Plaintiffs.

C. That the Court enjoin the Defendant from continuing the unlawful practice as alleged in Count I of this Complaint and order such other relief as may be necessary and appropriate to dissipate the effect of Defendant's unlawful acts.

D. That the Court appoint a receiver to receive and collect all deposits unlawfully required, charged and collected by Defendant, COMMONWEALTH EDISON COMPANY, and to distribute said collected deposits to the Plaintiffs of class named herein.

E. That the Court award to the attorneys for the Plaintiffs such reasonable and proper attorneys' fees as the Court deems appropriate.

F. Plaintiffs pray that the Court grant such other and further relief as the Court shall deem just.

• • •

WARREN P. LANDSMAN
Warren P. Landsman
ROBERT L. LANDSMAN
Robert L. Landsman

WARREN P. LANDSMAN and
ROBERT L. LANDSMAN
Attorneys for Plaintiffs
77 W. Washington Street
Chicago, Illinois 60602
FInancial 6-0531

Of Counsel:
LETTVIN and GERSTMAN
135 South LaSalle Street
Chicago, Illinois 60603
641-3320

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JUN 9 1972

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1429

PARTICULAR CLEANERS, INC. AND
FRANCES ENTWISTLE,
Petitioners,

vs.

COMMONWEALTH EDISON COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES A. BANE,
C. RICHARD JOHNSON,
One First National Plaza,
Suite 4200,
Chicago, Illinois 60670,
Attorneys for Respondent.

June 7, 1972.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1429.

PARTICULAR CLEANERS, INC. AND
FRANCES ENTWISTLE,

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COMMONWEALTH EDISON COMPANY,

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The complaint in this case was dismissed by the United States District Court for the Northern District of Illinois on March 15, 1971. The petition for a writ of certiorari seeks a review of the decision of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of the complaint. The Seventh Circuit's opinion is reported at 457 F. 2d 189.

The Complaint.

The complaint, brought as a "civil rights action" challenged respondent Commonwealth Edison Company's ("Edison's") policies of requiring security deposits from its prospective customers [Petition, pp. A19-21]. Respondent is a privately owned company which provides electric utility service to customers in the Chicago metropolitan area [Petition, p. A18].

The individual plaintiffs, a corporation apparently engaged in a dry cleaning business and an English citizen living in Chicago, purported to bring the case as a class action on behalf of all persons required to make security deposits as a condition of obtaining electric service [Petition, p. A18].

Essentially, the complaint charged that it was "arbitrary, capricious and discriminatory" for Edison to require certain customers to make deposits before beginning service while not requiring such deposits from other customers [Petition, pp. A19-21]. Plaintiffs alleged that "thousands of prospective purchasers of electric service . . . are arbitrarily and discriminatorily required to pay a security deposit based upon unequal and discriminatory standards and policies *arbitrarily dictated by numerous representatives of Defendant, Commonwealth Edison Company*" [Petition, p. A19, emphasis supplied.] The complaint did not state in what way any such security deposit policies of Edison were unequal or unfair. It did not even state what policies were complained of. Although the petition for a writ of certiorari [Petition, p. 5] alludes to deposit requirements being based on "sex, residence location and race", there are absolutely no allegations in the complaint (nor anywhere else in the record) as to any such discrimination.

Count I of the complaint charged that Edison's security deposit policies deprived plaintiffs of equal protection of the law and alleged that Edison's action was under color of an Illinois Commerce Commission regulation [Petition, p. A21]. Count II, based on asserted pendent jurisdiction, alleged a violation of Illinois utility laws dealing with rate discrimination [Petition, p. A16].

Under Illinois law, the Illinois Commerce Commission (the "Commission") has power to adopt regulations and to consider customer complaints concerning utility rates or service. [*Ill. Rev. Stat.*, ch. 111⅔, § 68 (1971)]. No Commission order or regulation in any way directs or orders the collection of any security deposits. The Commission's General Order 172 does provide *limitations* on the power of public utilities to require security deposits, restricting the amounts of such deposits and providing for return of deposits with 7% interest [Petition, pp. A2-8].

The Decisions Below.

Respondent moved to dismiss Count I on the grounds that there was no allegation of state action and that the complaint failed properly to allege any invidious or impermissible classification with regard to security deposits. Respondent moved to dismiss Count II, the pendent jurisdiction claim, because of the lack of jurisdiction over Count I and also on the ground that under Illinois law, the Illinois Commerce Commission has primary jurisdiction over claims as to public utility rate discrimination. The complaint had not alleged that petitioners had exercised their available remedies before that Commission.

The District Court granted Edison's motion to dismiss. In affirming the decision of the District Court, the Court of Appeals held that the complaint was deficient because the complained of actions of Edison did not constitute state

action. The opinion of the Court of Appeals specifically stated:

> "The complaint does not challenge the propriety of the action of the Illinois Commerce Commission or the order itself. It complains of 'the standards and policies arbitrarily dictated by numerous representatives of' Edison. The order in no way directs or orders the collection of any security deposits. It merely serves to limit the powers of public utilities to require deposits. There is no allegation that a public utility could not require such a deposit without this regulation. The decision to require security deposits to insure credit and its application of this policy in any particular case is strictly a private management decision to be made by Edison in its own normal business operation. Edison is neither the State of Illinois nor an agency thereof. We fail to see how the execution of these policies by Edison in the context of the case before us could constitute state action." [Petition, p. A12.]

ARGUMENT.

Respondent respectfully submits that this case is not an appropriate one for the issuance of a writ of certiorari. The decision of the Seventh Circuit follows the decisions of other federal courts on the issue of state action in civil rights claims against public utilities. There is no conflict of circuits. Moreover, the failure of the complaint to allege any invidious or impermissible classification makes this case a poor vehicle to test the application of equal protection claims to privately owned utility companies.

I.

There Is No Conflict of Decisions.

The decision of the Court of Appeals is in accord with federal court decisions holding that normal business actions of public utility corporations, even though subject to

state utility regulation, do not constitute state action for purposes of civil rights litigation. *Kadlec* v. *Illinois Bell Telephone Co.*, 407 F. 2d 624 (7th Cir. 1969), *cert. den.* 396 U. S. 846 (1969) [no state action in civil rights claim where utility customer was placed on less advantageous telephone rate pursuant to regulations filed with state utility commission]; *Lucas* v. *Wisconsin Electric Power Co.*, 322 F. Supp. 337 (E. D. Wisc. 1970) [no state action in civil rights claim where electric service was discontinued pursuant to cut-off policy regulated by state utility commission]; and *Martin* v. *Pacific Northwest Bell Telephone Co.*, 441 F. 2d 1116 (9th Cir. 1971), *cert. den.* 404 U. S. 873 (1971) [no state action in civil rights claim as to allegedly improper discharge of utility employee].

Nor is the decision of the Seventh Circuit in this case in conflict with Fourth and Fifth Circuit anti-trust cases cited by petitioners, *Washington Gas Light Co.* v. *Virginia Electric and Power Co.*, 438 F. 2d 248 (4th Cir. 1971); and *Gas Light Co.* v. *Georgia Power Co.*, 440 F. 2d 1135 (5th Cir. 1971), *cert. den.* 404 U. S. 1062 (1972). Neither of the cited cases involved state action in a civil rights context. Rather, these cases involved applications of the doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), exempting certain state approved practices from federal anti-trust laws.

Each of the cited anti-trust cases concerned the use by a utility of allegedly unfair rates, themselves state regulated, to expand an existing monopoly position made possible only by the state utility regulation. These cases presented far more significant state regulatory involvement in the complained of activities than does the case at bar. They are not in conflict with the principal applied by the Seventh Circuit that normal business decisions of public utilities such as the requiring of security deposits do not constitute state action within the meaning of the Fourteenth Amendment.

II.

The Complaint Does Not Allege Any Unconstitutional Discrimination.

More importantly, this case is a very poor vehicle to test the applicability of the equal protection clause to actions of privately owned utility companies. The complaint failed to allege any impermissible classification or invidious discrimination with regard to Edison's security deposit policy. It simply alleged that some customers were required to make deposits and others were not. Without any elaboration, the complaint concluded that the security deposit practices were "arbitrary, capricious and discriminatory" [Petition, pp. A19-21]. *There was absolutely no allegation of any racial, sexual, religious, political or any other improper classification among customers.* Indeed, in no way did the complaint state in what respect any classification or distinctions as to security deposits was improper or invidious.

The failure of the complaint to allege any improper or invidious classification not only provided an additional ground for dismissal of the action, it makes the case especially inappropriate for review by this Court. Without at least some more particular statement of what is complained of, the case is not one which could provide a useful vehicle for explication of constitutional principles.

For the foregoing reasons, respondent respectfully submits that the Petition for a Writ of Certiorari fails to present an important national issue appropriate for resolution by this Court. The Petition should be denied.

Respectfully submitted,

CHARLES A. BANE,
C. RICHARD JOHNSON,
One First National Plaza,
Suite 4200,
Chicago, Illinois 60670,
Attorneys for Respondent, Commonwealth Edison Company.

June 7, 1972.

FILE COPY

No. 71-1429

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1971

PARTICULAR CLEANERS, INC. and FRANCES ENTWISTLE,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY,

Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE H. GERSTMAN
NORMAN LETTVIN
135 South La Salle Street
Chicago, Illinois 60603

WARREN P. LANDSMAN
ROBERT L. LANDSMAN
77 West Washington Street
Chicago, Illinois 60602

Counsel for Petitioners

June, 1972

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1971

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REPLY BRIEF

There are three arguments first raised in Respondent's Opposition Brief which Petitioner submits are clearly inaccurate.

First, Respondent claims, on page 4 of its brief, that "The decision of the Seventh Circuit follows the decisions of other federal courts on the issue of state action in civil rights claims against public utilities." The only civil rights case in another federal circuit, cited by Respondent and involving a utility, is *Martin* v. *Pacific Northwest Bell Telephone Co.*, 441 F.2d 1116 (9 Cir., 1971). In *Martin* the

Court of Appeals held that the state was not involved with the plaintiff's charge that he was unjustly fired from his job with the utility. In very sharp contrast, in the case at bar Respondent's discrimination, essentially on the basis of wealth, in the collection of security deposits is under color of a state ordinance (ICC General Order 172).

Second, Respondent's attempt to distinguish the present case from *Washington Gas Light Co.* v. *Virginia Electric and Power Co.*, 438 F.2d 248 (4 Cir., 1971) and *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135 (5 Cir., 1971) must fail. Respondent's statement on page 5 of its brief that "These cases presented far more significant state regulatory involvement in the complained of activities than does the case at bar" is incorrect. In fact, both in *Gas Light Co. of Columbus* and *Washington Gas Light* the promotional practices were pursuant to directives issued by the utilities themselves and were *not* pursuant to a general order of the state Commission as is the case here. Further, in *Washington Gas Light*, the promotional practices complained of were never expressly approved by the state regulatory authority. Obviously the state regulatory involvement in the present case is far more significant than in *Gas Light Co. of Columbus* or in *Washington Gas Light* because of the fact that the complained of practices here are directly under color of Illinois Commerce Commission General Order No. 172.

Third, Respondent's argument on page 6 of its brief, that the Complaint failed to allege any improper or invidious discrimination, is also in error. The Complaint specifically alleges that Respondent's actions in requiring security deposits from purchasers and prospective purchasers placed these purchasers at an economic disadvantage, thereby damaging them to the extent of the amount

required (App. pp. A. 19-20). So long as some persons are at any time arbitrarily and discriminatorily placed at an economic disadvantage with respect to others under color of an Illinois Commerce Commission regulation, there is a violation of basic civil rights. Those who are required to pay a security deposit are generally those who can least afford to. Respondent's discrimination, which is essentially on the basis of wealth, denies equal protection of the laws in violation of the Civil Rights Act. Cf. *Rodriquez* v. *San Antonio Independent School District*, 337 F. Supp. 280 (D.C.W.D. Tex., 1972) *probable jurisdiction noted by this Court* June 7, 1972, No. 71-1332.

For the reasons stated in the Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GEORGE H. GERSTMAN
NORMAN LETTVIN
WARREN P. LANDSMAN
ROBERT L. LANDSMAN
Attorneys for Petitioners

LETTVIN AND GERSTMAN
135 South LaSalle Street
Chicago, Illinois 60603
Telephone: 641-3320

June, 1972

In the Supreme Court of the United States

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SUPPLEMENTAL BRIEF OF PETITIONERS

A Recent Eighth Circuit Case Is In Conflict With The Case At Bar

This brief is supplemental to Petitioners' Reply Brief and is being filed to advise this Court of a recent Eighth Circuit decision which is in conflict with the decision of the Seventh Circuit case at bar.

In the case at bar, the Court of Appeals for the Seventh Circuit held that the alleged discriminatory collection of security deposits by a utility, under authority of Illinois Commerce Commission General Order 172, does *not* con-

stitute conduct under color of law so as to subject the utility to 42 U.S.C. §1983. In sharp contrast, the Court of Appeals for the Eighth Circuit, on May 3, 1972, held that a utility's threat to terminate a subscriber's utility service without a prior hearing, constituted conduct under color of law thereby subjecting the utility to 42 U.S.C. §1983.

The Eighth Circuit case referred to is *Ihrke* v. *Northern States Power Company*, No. 71-1504 (8 Cir., May 3, 1972), not yet reported. In *Ihrke*, the district court had found, *inter alia*, that Northern's threat to terminate the Ihrkes' utility services without a prior hearing did not fall within the purview of the Civil Rights Act, 42 U.S.C. §1983, since Northern had not acted under color of state law. *Ihrke* v. *Northern States Power Co.*, 328 F.Supp. 404 (D. Minn., 1971). The Court of Appeals for the Eighth Circuit reversed, stating on page 8 of its official opinion:

> "By its own actions, the City of St. Paul has in effect given Northern a monopoly on the retail distribution of gas and electricity and as a practical matter, the Ihrkes could not buy these commodities from any other source. Under these circumstances, we think it is abundantly clear that the action of Northern in threatening to terminate the service to the Ihrkes was under "color of law" as used in 42 U.S.C. §1983, and the trial court's determination to the contrary was erroneous."

On May 2, 1972, just one day prior to the Eighth Circuit decision in *Ihrke*, the District Court for the Northern District of Ohio, Western Division, also held that action of a public utility "which comes under the umbrella of a state statute or state authorized regulation constitutes state action." *Palmer* v. *Columbia Gas Company of Ohio*, Civil No. C 72-14 (N.D. Ohio, May 2, 1972), not yet reported.

Petitioners' Main Brief brought out the conflict in principle between the Fourth and Fifth Circuit Courts of Appeals on the one hand, and the Seventh Circuit Court of Appeals on the other hand, as to what action of a utility constitutes "state action." Now the Eighth Circuit is also in conflict with the Seventh Circuit as to whether a utility is subject to the Civil Rights Act. The immense public interest involved here (as demonstrated by the increasing number of cases concerned with the issue) and the conflict between the circuits render it desirable for a Writ of Certiorari to be issued by this Court.*

Respectfully submitted,

GEORGE H. GERSTMAN
NORMAN LETTVIN
WARREN P. LANDSMAN
ROBERT L. LANDSMAN
Attorneys for Petitioners

LETTVIN AND GERSTMAN
135 South LaSalle Street
Chicago, Illinois 60603
Telephone: 641-3320

June, 1972

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* Further, this Court has recently implied that an electric utility's actions may fall within the purview of the Civil Rights Act. In *Moose Lodge No. 107* v. *Irvis* (Docket No. 70-75, decided by this Court on June 12, 1972), this Court stated that "Since *state-furnished services* include such necessities of life as electricity, water, and police and fire protection . . . ." (Emphasis added)

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Supreme Court, U. S.
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OCTOBER TERM, 1971

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

RESPONDENT'S REPLY TO SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES A. BANE
C. RICHARD JOHNSON
One First National Plaza
Suite 4200
Chicago, Illinois 60670

Attorneys for Respondent, Commonwealth Edison Company

July 14, 1972

MIDWEST LAW PRINTING CO., CHICAGO 60601. FINANCIAL 6-3988

IN THE

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OCTOBER TERM, 1971

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

RESPONDENT'S REPLY TO SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In their supplemental brief petitioners assert that the Seventh Circuit's decision in this case conflicts with *Ihrke* v. *Northern States Power Co., Util. L. Rep.* ¶21,740 (8th Cir. May 3, 1972). Respondent Commonwealth Edison Company submits, however, that this case is significantly different from *Ihrke* and is in any event a poor case for review by this Court.

In *Ihrke,* the Court of Appeals for the Eighth Circuit held that a defendant utility company acted under color

of state law in terminating plaintiffs' gas and electric service. But unlike the instant case, *Ihrke* involved a utility whose termination procedures were subject to regulation by a municipality which shared in a percentage of the utility's collections and whose property the utility used. Indeed, the Eighth Circuit pointed to these characteristics as distinguishing the case from *Kadlec* v. *Illinois Bell Telephone Co.*, 407 F. 2d 624 (7th Cir.), *cert. den.* 396 U.S. 846 (1969), on which the Seventh Circuit relied in its decision here below:

> "However, this case [*Ihrke*] does not present the same situation [as *Kadlec*]. . . . [S]ince the city received 5% of Northern's gross earnings, the city benefitted from the payment of bills resulting from Northern's threatening to terminate services." *Util. L. Rep.* ¶21,740 at 48,306.

Given these special factors in *Ihrke* which were not present here, there would appear to be no conflict of circuits.

In any event, here the failure of the complaint to have alleged any impermissible or invidious classification showing any equal protection claim provided an additional ground for dismissal. This makes the case inappropriate for review by this Court regardless of any difference between circuits.

Respectfully submitted,

CHARLES A. BANE
C. RICHARD JOHNSON
One First National Plaza
Suite 4200
Chicago, Illinois 60670

Attorneys for Respondent,
Commonwealth Edison Company

July 14, 1972

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SECOND SUPPLEMENTAL BRIEF OF PETITIONERS

This Second Supplemental Brief is necessary in order to correct an erroneous statement made by respondent Commonwealth Edison in its Reply to Supplemental Brief, filed July 14, 1972.

Petitioners had correctly asserted in their Supplemental Brief that the Seventh Circuit's decision in the instant case conflicts with *Ihrke* v. *Northern States Power Co.*, ... F.2d ....., Util. L. Rep. ¶21,740 (8 Cir., May 3, 1972).

In its Reply to Supplemental Brief, respondent attempted to distinguish *Ihrke* from the instant case, asserting that in *Ihrke* the city received 5% of the utility's gross

earnings and thus benefited from payments to the utility, while such a "special factor" is not present in the instant case. Such attempt to distinguish the two cases is wholly erroneous.

In the instant case, the State of Illinois receives 5% of Commonwealth Edison's gross receipts and thus benefits from payments to the utility, just as in *Ihrke*. The 5% is collected by the State of Illinois pursuant to Section 2 of the Public Utilities Revenue Act (Ill. Rev. Stats., chap. 120 § 469).

Thus it is clear that respondent is acting under color of state law and there is a conflict of circuits.

Respectfully submitted,

GEORGE H. GERSTMAN
NORMAN LETTVIN
WARREN P. LANDSMAN
ROBERT L. LANDSMAN
Attorneys for Petitioners

LETTVIN AND GERSTMAN
135 South LaSalle Street
Chicago, Illinois 60603
Telephone: 641-3320

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